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THE MICHIGAN JUDICATURE ACT OF 1915

I.

THE DISTINCTIONS BETWEEN LAW AND EQUITY PROCEEDINGS.

IN 1848 a wave of reform in judicial procedure began to sweep over the United States. In that year the legislature of New York enacted the Code of Civil Procedure, a statute of far-reaching importance, for it became the source of and the model for similar legislation in almost two-thirds of the States in the Union.

In this act the distinctions between law and equity proceedings received distinguished consideration, for the first article dealing with civil actions opened with the sententious announcement that "the distinction between actions at law and suits in equity, and the forms of all such actions and suits heretofore existing, are abolished."[1]

Two years later, in 1850, a new constitution was adopted by the people of the State of Michigan. That the New York Code of Civil Procedure had meanwhile begun to exert an influence in this State is very clear from an innovation introduced into that document, for in Article VI, Section 5, it was provided that "*The Legislature shall as far as practicable, abolish distinctions between law and equity proceedings.*"

Evidently there was a popular demand for a reform of the same general character as that introduced in New York, and the people through their constitution did all that peremptory language could do to obtain suitable legislation on the subject. But the legislature failed to carry out the people's mandate. Instead it sought to shift the task upon the Supreme Court, and in 1851 a statute was passed which provided that—"The Judges of the Supreme Court shall have the power, and it shall be their duty, within three months after this

[1] N. Y. Laws 1848, Ch. 379, § 62.

law shall take effect, by general rules to establish, and from time to time modify and amend, the practice in said Court and in the Circuit Courts, * * * and they shall, once at least in every two years thereafter, if necessary, revise the said rules, with a view to the attainment, so far as may be practicable, of the following improvements in the practice: 1. *The abolishing of the distinctions between law and equity proceedings, as far as practicable.*"[2]

Probably the legislative conscience was satisfied by the passage of this act, for nothing more was done by the legislature for more than sixty years. Doubtless also the Supreme Court was not at all disturbed by this gratuitous bequest from the legislature, for no response was vouchsafed by the court. For two-thirds of a century the legislature has waited for the Supreme Court, and the Supreme Court has waited for the legislature, and until the last session the people failed to obtain relief, although the same demand for legislative action was repeated in the constitution of 1908.[3]

In the Judicature Act of 1915 the legislature at last took up the matter. It did not in terms abolish all distinctions between legal and equitable proceedings, as the New York Code had done. Its language is much less sweeping and its immediate object much less pretentious, but a brief survey of the results reached by the reforms in New York and elsewhere will show that the modest provisions of the Judicature Act have really covered a considerable part of the available field of reform.

All that the constitution of 1850 provided for was an abolition of the distinctions between law and equity proceedings *as far as* the same should be *practicable*. It contemplated that it might be impracticable wholly to abolish them all. How far, then, is it practicable to remove these distinctions?

As to Mode of Trial. It has not been practicable to abolish the distinctions between trials at law and trials in equity. The Codes have all undertaken to abolish every distinction that could be abolished, and yet in every State which operates under the Code, trial by the court in equity cases and trial by jury in law cases has remained, and so long as constitutional guarantees protect the right of trial by jury this striking distinction cannot be erased.

As to Practice on Appeal. Since no jury intervenes in equity cases, reversals on appeal do not ordinarily result in new trials, and the appellate court can itself pass upon the correctness of the conclusions drawn below as to matters of fact. This distinction cannot be abolished under modern constitutional guarantees.

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[2] Laws of 1851, p. 106.

[3] Const. Art. VII, § 5.

As to the Relief Granted. Courts of law give judgments for damages or for the recovery of specific real or personal property. Courts of equity give specific relief of many kinds, such as enjoining unlawful acts, compelling the performance of contracts, reforming instruments, setting aside fraudulent conveyances, quieting titles, etc. The distinctions between the two kinds of relief cannot be abolished, nor has it ever been found practicable to abolish the old rule that the remedies of equity cannot be obtained unless the remedies of the law are inadequate. That rule is as firmly intrenched under Code practice as it ever was at common law. The greatest American writer upon the Code and its most able defender admits that the "abolition of the distinction between legal and equitable actions, and of the forms of legal actions, does not abolish the distinctions between remedies. If from the nature of the primary right, and of the wrong by which it is invaded, the injured party would under the old system have been entitled to an equitable remedy, he is still entitled to the same relief, and it may well be termed equitable; if from the like causes he would have been entitled to a legal remedy, he is still entitled to the same relief, and it may properly be described as legal."[4]

As to Parties to Actions. Common law courts recognized only joint and several rights and liabilities. The cases of which the common law courts took jurisdiction were those wherein all the parties on each side formed a homogeneous group capable of being treated as a unit. Generally speaking, the judgment went for or against the entire group, and this resulted largely from the fact that the cases falling under the jurisdiction of the common law courts were simple so far as they involved the interrelation of parties. A single right enjoyed by one or more plaintiffs, was predicated on the breach of a single duty resting on one or more defendants.

But in equity parties were not so rigidly classified. Equitable controversies covered a wider range, involved various duties resting in varying degrees upon different parties, were not looked upon as always two-sided but as many-sided, each party or group of parties sustain more or less complicated interrelations with other individual parties or groups. In cases of this kind the simple and rigid conceptions of joint and several rights and duties, which formed the basis of common law procedure respecting the joinder and nonjoinder of parties, were clearly inapplicable, and a wholly different notion of the relations of parties to litigated controversies was necessary. In this way there grew up an entirely different practice in equity respecting the matter of parties. It was not accidental, but

[4] Pomeroy on Code Remedies (4th Ed.) 14.

followed as a necessary consequence of the intricacies of equitable relations. These rules of practice respecting parties must be employed in equitable actions; but they are unnecessary in actions at law. Many of the liberal rules of equity, if they were to be made universal, would seldom if ever be resorted to in legal actions. A court of last resort sitting in a Code State recently said: "Equitable doctrines with respect to parties and judgments are wholly unlike those which prevail at common law—different in their fundamental conceptions, in their practical operations, in their adaptability to circumstances and in their results upon the rights and duties of litigants."[5] Distinctions between things that are different cannot be abolished even by statutory language which expressly undertakes to do so.

As to Pleadings. There are fundamental differences between causes of action in equity and causes of action at law. The nature of the showing necessary to obtain relief in equity is different from that which discloses a right to a judgment for damages. Legal causes of action are reducible to a few material elements. Each part is essential, and to omit one is as fatal as to omit all. A material issue can be raised by the denial of any one. The elements making up the cause of action at law are like links in a chain; the whole chain has only the strength of the weakest link; if one link breaks the chain is gone.

But in equity the material facts are of a different nature. One cannot ordinarily raise a material and decisive issue by the denial of any one. They are of varying degrees of importance, and the pleadings may show a strong or a weak case, which is not true at law. The elements going to make up the cause in equity are not like links in a chain, but like threads in a web; a thread may break but it may not destroy the fabric.

The writer on the Code already quoted has pointed out these distinctions between pleadings at law and in equity as characteristic under all systems of procedure. Statutes have not and cannot abolish them. He says: "In the legal action the issuable facts are few; in the equitable action the material facts upon which the relief depends, or which influence and modify it, are generally numerous and often exceedingly so. In the former they are simple, clearly defined, and certain; in the latter they may be, and frequently are, complicated, involved, contingent, and uncertain. A distinction inheres in the nature of the causes of action, and from this distinction the facts material to the recovery in an equitable suit may be numerous, complicated, affecting the right of recovery par-

[5] Seiver v. Un. Pac. R. R. Co., (68 Neb. 91), 93 N. W. 943, 61 L. R. A. 319, 110 Am. St. Rep. 393.

tially instead of wholly, modifying rather than defeating, the remedy if not established; but still they are the material facts constituting the cause of action, and not mere details of evidentiary or probative matter."[6]

It would seem clear, therefore, that no efforts on the part of the reformer could make pleadings at law and in equity identical. In so far as the causes of action are inherently different and founded on different conceptions of the function of allegations, the rules for their statement must also differ. A bill for a divorce on the ground of cruelty is necessarily a very different thing from a declaration for breach of a promise to marry.

If all the foregoing differences between equitable and legal proceedings are insurmountable, how far is is *practicable,* to use the words of the Michigan Constitution, to abolish the unwelcome distinctions?

One thing is practicable, and that is to abolish limitations on the jurisdiction of courts, giving one tribunal power to adjudicate all cases at law and in equity. This does not result in a confusion of court business. Where one court has the double jurisdiction it is immediately divided up into law and equity divisions, or its business is apportioned to law and equity calendars or dockets.

Thus, in England, the Supreme Court of Judicature Act of 1873 consolidated all the superior courts of England, that is to say, the High Court of Chancery, the Queen's Bench, the Common Pleas, the Exchequer, the High Court of Admiralty, the Court of Probate and the Court for Divorce and Matrimonial Causes, into one Supreme Court of Judicature, with all the powers of the various courts which were merged into it. This combined in one court all equitable and legal powers, and gave to that court full legal and equitable jurisdiction.

The English Judicature Act then proceeded to separate the court into divisions for the more convenient dispatch of business, and these divisions followed in a general way the jurisdictional lines of the old courts which had been consolidated. These were the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce and Admiralty Division.

By the supplementary Act of 1875 it was provided that every person who commenced an action should assign the cause to that division of the court which he deemed proper by marking the name of that division upon the summons by which the action was commenced. Almost all of the so-called Code states have adopted this

[6] Pomeroy's Code Remedies (4th Ed.) 558.

reform of consolidating courts and jurisdiction, and so have other states which are not to be so classed.[7] On the other hand so progressive an act as the New Jersey Practice Act of 1912, confines itself to proceedings in actions at law, and not only does not merge the law and chancery courts but does not even attempt to change the chancery practice.

There are important advantages in consolidation of courts, and it is to be regretted that Michigan is not to enjoy a single court having jurisdiction of both law and chancery cases. Where such a consolidation is made both legal and equitable questions and issues may properly be raised in the same proceeding, and legal and equitable rights and defenses may be set forth in the same pleadings, and legal and equitable relief may be administered through the same judgment. It would save the absurdity of the judge as a chancellor formally enjoining parties from prosecuting an action before him as a law judge, for if he exercised both law and equity jurisdiction an equitable counter-claim in the original action would fully meet the need.

But a still more serious result of the distinction between proceedings at law and in equity has been the disastrous effect of commencing an action in the wrong court. This is something which is wholly unnecessary, and it suggests that

Another thing is entirely practicable, and that is to abolish the consequences now resulting from commencing a law action in the chancery court, or an equity action in the law court.

If the two courts were merely two divisions of the same court, or if one court merely maintained separate law and equity dockets, nothing would seem more natural than to transfer a case from one division or one docket to the other when the administration of justice would be thereby facilitated.

Thus, in England, after having established the five divisions of the Supreme Court of Judicature, the Judicature Act provided that any cause or matter might at any time, with or without application from any of the parties thereto, be transferred from one division to another.

When any party finds that he is in the wrong division of the court he is authorized by Rule of Court to notify the other party that he will at a certain time and place apply for an order transferring the cause to the proper division.

But this practice is in reality equally appropriate whether there are two courts, or two divisions or two dockets of a single court.

[7] For example,—Georgia, Code, 1895, § 4320; Pennsylvania, Purdons Dig. Equity; Massachusetts, R. L., 1902, Ch. 159.

And this is the practice which has been adopted by the Michigan Judicature Act. Chapter XI, Sec. 2, provides:

> "If at any time it appears that a suit commenced in equity should have been brought as an action on the law side of the court, or if it appear that an action commenced on the law side of the court should have been brought in equity, it shall be forthwith transferred to the proper side, and be there proceeded with, with only such alteration in the pleadings as shall be necessary."

A serious practical disadvantage incident to the divided jurisdiction which the Judicature Act retains, appears in connection with the question, how the objection of want of equity should be raised. In principle there should no longer be such an objection. A failure to allege facts entitling the plaintiff to *any* relief would raise a question going to the merits of the bill, but the mere objection that the plaintiff has not shown himself entitled to relief in a court of equity would not necessarily mean any more than that he was on the wrong side of the court. Want of equity ought therefore to be deemed an ambiguous and improper objection. The defendant should logically, either raise the substantial question whether the plaintiff's pleading showed a right to any relief, or he should expressly raise the formal objection that the case is on the wrong side of the court, and ask to have it transferred. But inasmuch as the court on each side has only the limited jurisdiction appurtenant to that side, it is without jurisdiction to determine the substantial question whether the plaintiff is entitled to *any* relief. All the equity court can do is to pass on the question whether the plaintiff states facts entitling him to relief in equity; and conversely, the law court has jurisdiction only on the question whether plaintiff has alleged a good cause of action at law. It seems, therefore, that the substantial question, whether the pleading shows a right to any relief, must, under the Judicature Act, be split up into two questions, (1) does the bill (or declaration) show a good cause of action in equity (or at law) and, if this question has been determined in the negative and a transfer made to the other side of the court, the defendant is in a position to raise the next question, (2) does the bill (or declaration) show a good cause of action on the side of the court to which it has been transferred? Under the practice in those Code states where the jurisdiction in law and equity has been consolidated, but where the two classes of proceedings, legal and equitable, are still retained, the objection is either that the plaintiff has not alleged facts entitling him to *any* relief or that his case should

be transferred to the other side of the court.[8] This is good practice, but seems unavailable under the Judicature Act.

The Judicature Act appears, on the whole, to be a very conservative statute in its bearing upon the distinctions between legal and equitable proceedings. So far as it goes it is unquestionably good, and the only strange thing is that after waiting more than sixty years to carry out a reform ordered by the Constitution, the reform was not made more complete. The act does go somewhat farther than here indicated, by removing the distinctions in name between law and chancery summonses,[9] and between parties plaintiff in law and chancery cases,[10] and between the designations of attorneys and clerks of court on the two sides of the court;[11] and it unifies the law and chancery practice in the matter of the persons who are authorized to serve process,[12] and enlarges the territorial scope of the summons at law in emulation of the state-wide scope of the summons in chancery;[13] and in various other details it removes useless differences in the practice relating to law and chancery cases. It may be hoped that the good effects of the Act will so favorably impress the bar and the public that the way may be paved for a subsequent consolidation of jurisdictions.

(*To Be Continued.*)

EDSON R. SUNDERLAND.

University of Michigan Law School.

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[8] Trustees v. Forrest, 15 B. Mon. 168; Conyngham v. Smith, 16 Ia. 471.
[9] Chap. XIII, § 5.
[10] Chap. XII, § 1.
[11] Chap. 1, § 48; Chap. II, § 65.
[12] Chap. XIII, § 22.
[13] Chap. XIII, § 27.